Supreme Court, U. S.
FILED
MAY 29 1975
JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police, Jefferson County Division of Police - Petitioners

versus

EDWARD CHARLES DAVIS, III - - Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CERTIORARI GRANTED APRIL 14, 1975

APPENDIX

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

EDWARD CHARLES DAVIS, III, *Plaintiff*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police, and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police, *Defendants*

Civil Action No. 7502-B

COMPLAINT

Plaintiff, for his complaint, alleges as follows:

1. The jurisdiction of this Court arises under Title 28 U.S.C. §§ 1343(3)(4), 2201, 2202, and Title 42 U.S.C. § 1983. This is a proceeding to redress the violation of rights guaranteed to the plaintiff by the Constitution of the United States, in particular, the right of privacy, which is protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to said Constitution, and the right to due process of law, which is guaranteed by the Fourteenth Amendment to said Constitution.

2. Plaintiff EDWARD CHARLES DAVIS, III, is a citizen of the United States and the Commonwealth of Kentucky, currently residing at 3218 Virginia Avenue, Louisville, Kentucky.

3. Defendant EDGAR PAUL is the duly-constituted and acting Chief of Police of the Louisville Division of Police, and all acts of said defendant described herein were taken under color of state law and by virtue of the authority vested in him in his capacity as Chief of Police of Louisville Division of Police.

4. Defendant RUSSELL MCDANIEL is the duly-constituted and acting Chief of Police, Jefferson County Police, and all acts of said defendant described herein were taken under color of state law and by virtue of the authority vested in him in his capacity as Chief of Police, Jefferson County Police.

5. Plaintiff DAVIS sues on behalf of himself and all persons similarly situated to wit, persons whose names and photographs are contained in a flyer distributed by the defendants to various business establishments in the Louisville metropolitan area, which will be described more fully herein, notwithstanding that said persons have not been convicted of the offense of shoplifting or any similar offense. These persons constitute a class so numerous as to make it impractical to bring them before this Court. There are common questions of law and of fact affecting the rights of said persons, and common relief is sought. The defendants have acted, and intend to continue to act, on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. The plaintiff will fairly and adequately represent the interests of the class.

6. On or about December 5, 1972, the defendants jointly caused to be sent a flyer to numerous business establishments in the Louisville metropolitan area. A copy of said flyer is attached to this Complaint as Annex A. The stated purpose of the flyer was to enable business establishments to watch for the persons whose names and photographs were contained in the flyer, said persons being described as "subjects known to be active in the criminal field of shoplifting." The flyer stated that the persons whose names and photographs were contained therein "have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas." The business establishments to whom the flyer was sent were invited to obtain additional information from the

Planning and Research Unit of the Louisville Division of Police. The name and photograph of the plaintiff was contained on page 2 of said flyer under the heading of "active shoplifters."

7. The plaintiff is a law-abiding citizen who is employed as a photographer by the Louisville Courier-Journal and Times. On June 14, 1971, he was arrested in Louisville, Kentucky on a charge of shoplifting. Plaintiff was innocent as to said charge. The charge was filed away, and the plaintiff was never tried or convicted of such charge. A certified copy of the order filing the charge away is attached to this Complaint as Annex B. Thereafter, the charge was totally dismissed by the Court. A certified copy of the order dismissing the charge is attached to this Complaint as Annex C.

8. Following the circulation of the flyer described above by the defendants herein, the plaintiff was informed by his employer that his ability to perform as a photographer on said job was seriously impaired as a result of his name and photograph having been included in said flyer, and that his employer was considering the possibility of terminating his employment for that reason, and that he would be immediately discharged upon any subsequent arrest.

9. The actions of the defendants herein in publicly disseminating to various business establishments the name and photograph of the plaintiff and the other members of the class under the heading of "active shoplifters" are violative of rights guaranteed to the plaintiff and the class by the Constitution of the United States for the following reasons among others:

(1) They violate the right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to said Constitution, in that they constitute disclosure to large segments of the pub-

lic of the existence of an arrest which has not terminated in conviction, together with a declaration on the part of governmental officials that the persons arrested were in fact guilty of the offense and are likely to commit the same offense again;

(2) They impose an unconstitutional restrain on the liberty of persons designated as "active shoplifters" in that these persons will be inhibited from entering business establishments for lawful purposes because of the fear that they will be suspected of shoplifting and possibly apprehended, which is violative of the Fourteenth Amendment's guarantee of due process of law;

(3) They seriously impair the employment opportunities of persons designated as "active shoplifters," in that employers will be inhibited and deterred from employing such persons, since that designation carries the connotation that they are not trustworthy and are likely to commit criminal offenses, which is violative of the Fourteenth Amendment's guarantee of due process of law;

(4) They constitute summary punishment of persons who have not been convicted of any criminal offense, in that they brand such persons as criminals, which likewise is violative of the Fourteenth Amendment's guarantee of due process of law.

10. As a result of the illegal and unconstitutional actions described herein, the plaintiff and the class he represents have suffered grievous mental anguish, injury to his reputation, and permanent impairment of his earning capacity, for which compensation is sought.

WHEREFORE, plaintiff respectfully prays for the following relief:

1. That a declaratory judgment be issued to the effect that the actions of the defendants described herein are violative of rights guaranteed to the plaintiff and the class he represents by the Constitution of the United States.

2. That a permanent injunction issue against the defendants, their agents, employees and attorneys, and all other subject to their direction, restraining them from further circulation of the flyer described herein or of any other material listing the plaintiff and the class he represents as "active shoplifters" or in any other way publicly disseminating information concerning the previous arrest of the plaintiff for the offense of shoplifting.

3. That a permanent injunction issue against the defendants, their agents, employees and attorneys, and all others subject to their direction, requiring that they take the following actions forthwith:

(1) That they obtain the return of the flyers described herein from all business establishments and persons to whom said flyers were sent;

(2) That they instruct by an identical method, i.e. in writing and following the initial distributive pattern, said business establishments and persons that the plaintiff and the other members of the class are not "active shoplifters," but to the contrary have not been convicted of shoplifting or any similar offense;

(3) That they turn over all records in their possession relating to the plaintiff's arrest for the offense of shoplifting to this Court, so that said records may be destroyed by the United States Marshall in open Court.

4. That the plaintiff be awarded compensatory damages against each defendant in the amount of $50,000, and puni-

tive damages against each defendant in the amount of $100,000.

5. That pending the hearing and determination of plaintiff's prayer for permanent relief, a preliminary injunction be issued against the defendants, their agents, employees and attorneys and all others subject to their direction, requiring that they take the following actions forthwith:

(1) That they obtain the return of the flyers described herein from all business establishments and persons to whom said flyers were sent;

(2) That they instruct by an identical method, i.e. in writing and following the initial distributive pattern, said business establishments and persons that the plaintiff and the other members of the class are not "active shoplifters," but to the contrary have not been convicted of shoplifting or any similar offense.

6. That the plaintiff be awarded his costs herein, including reasonable attorneys fees.

7. That the plaintiff be awarded any and all relief to which he or the class he represents, may appear to be entitled.

(s) William H. Allison, Jr.
139 South Fourth Street
Louisville, Kentucky 40202

Robert Allen Sedler
B x 862
University Station
Lexington, Kentucky 40506

Attorneys for Plaintiff on behalf of the Kentucky Civil Liberties Union

ANNEX B

Case No. E66147 December 8, 1972

Commonwealth of Kentucky - - - Plaintiff

v.

Edw. Chas. Davis, III - - - - - Defendant
407 So. 39th

CERTIFIED COPY OF JUDGMENT

At a Court held on the 21 day of September, 1971, came the Defendant in person and by counsel _____ pursuant to a Warrant of arrest or pursuant of arrest or citation made 14 day of June, 1971, and having been arrainged upon the charge of KRS 433-234 entered a plea of NOT GUILTY thereto.

There appeared as witnesses for the Commonwealth:

Officer Richardson Consolidated Sales

There appeared as witnesses for the Defendant:

Final Disposition: 9/21/71 Filed Away With Leave No P.W.

This 8 day December, 1972.

(s) Neville M. Tucker, Judge

I, Margueritte Younger, Clerk of the City of Louisville Police Court do hereby certify that the foregoing is a true and correct copy of the Judgment rendered herein.

ANNEX C

Case No. E66147 December 12, 1972

Commonwealth of Kentucky - - - Plaintiff

v.

Edw. Chas Davis, 3rd - - - - - Defendant
407 So. 39th

CERTIFIED COPY OF JUDGMENT

At a Court held on the 11 day of December, 1972, came the Defendant in person and by counsel _____ pursuant to a Warrant of arrest or pursuant of arrest or citation made 14 day of June, 1972, and having been arraigned upon the charge of KRS 433-234 entered a plea of NOT GUILTY thereto.

There appeared as witnesses for the Commonwealth:

Officer Richardson

There appeared as witnesses for the Defendant:

Final Disposition: 12/11 Dismissed Per Judge Shobe

This 12 day December, 1972.

(s) Ben Shobe, Judge

I, Margueritte Younger, Clerk of the City of Louisville Police Court do hereby certify that the foregoing is a true and correct copy of the Judgment rendered herein.

(s) Margueritte Younger

ANNEX A

TO: BUSINESS MEN IN THE METROPOLITAN AREA

The Chiefs of The Jefferson County and City of Louisville Police Departments, in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field.

This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.

Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing to:

PLANNING AND RESEARCH UNIT
LOUISVILLE DIVISION OF POLICE
633 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202

NOTE: ALL REQUESTS SUBJECT TO APPROVAL BY THE RESPECTIVE CHIEF OF POLICE.

This flyer's preparation is accredited to officers of the Second(2nd) Police District, Tactical Unit, and Detectives of the Criminal Intelligence Section, in cooperation with the Planning and Research-Development staffs of the Police Departments.

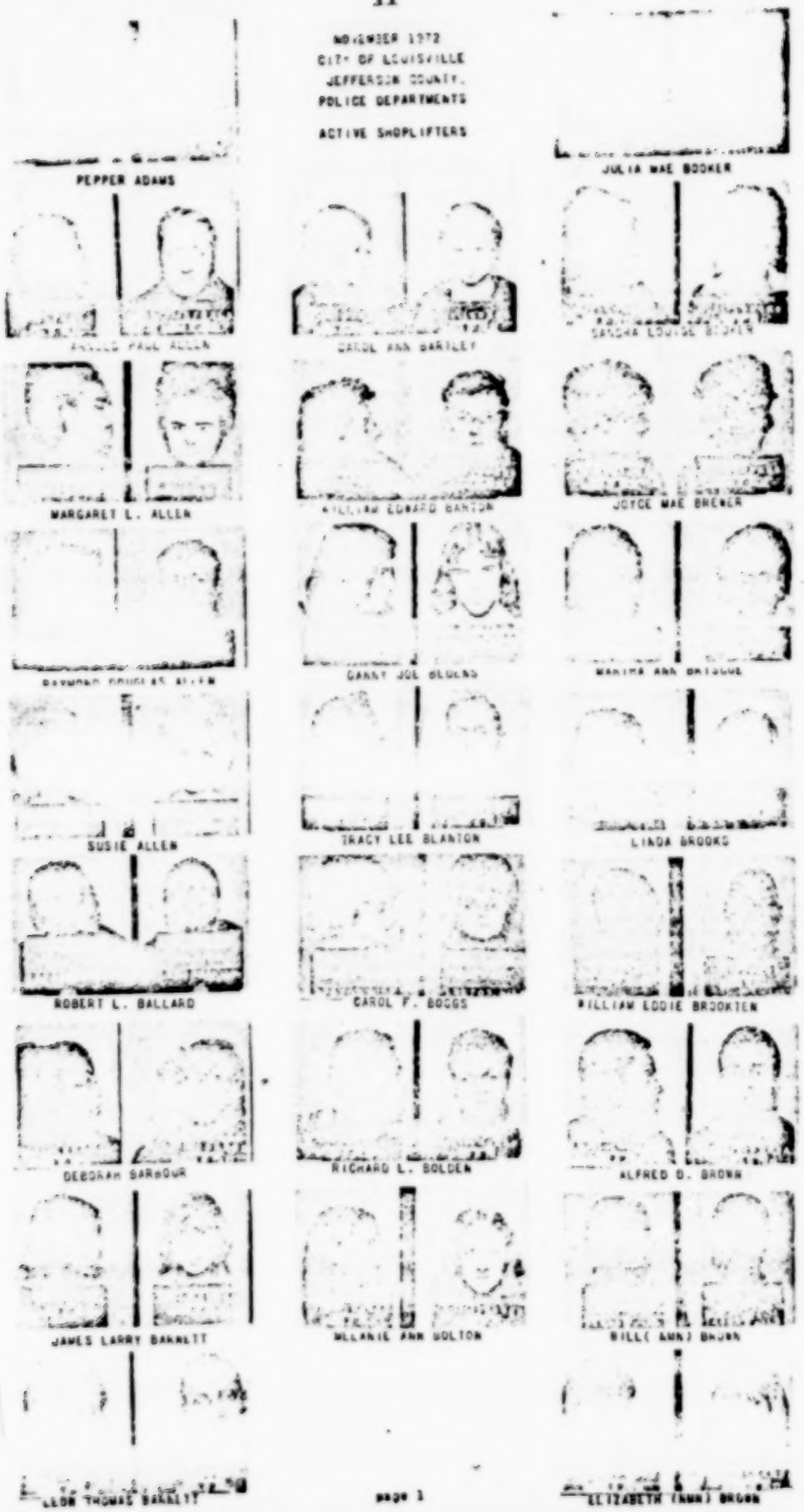
Sincerely,

(s) Col. Edgar Paul
Chief of Police
Louisville Division of Police
EP/hr

(s) Col. Russell McDaniel
Chief of Police
Jefferson County Police
RM/hr

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY,
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

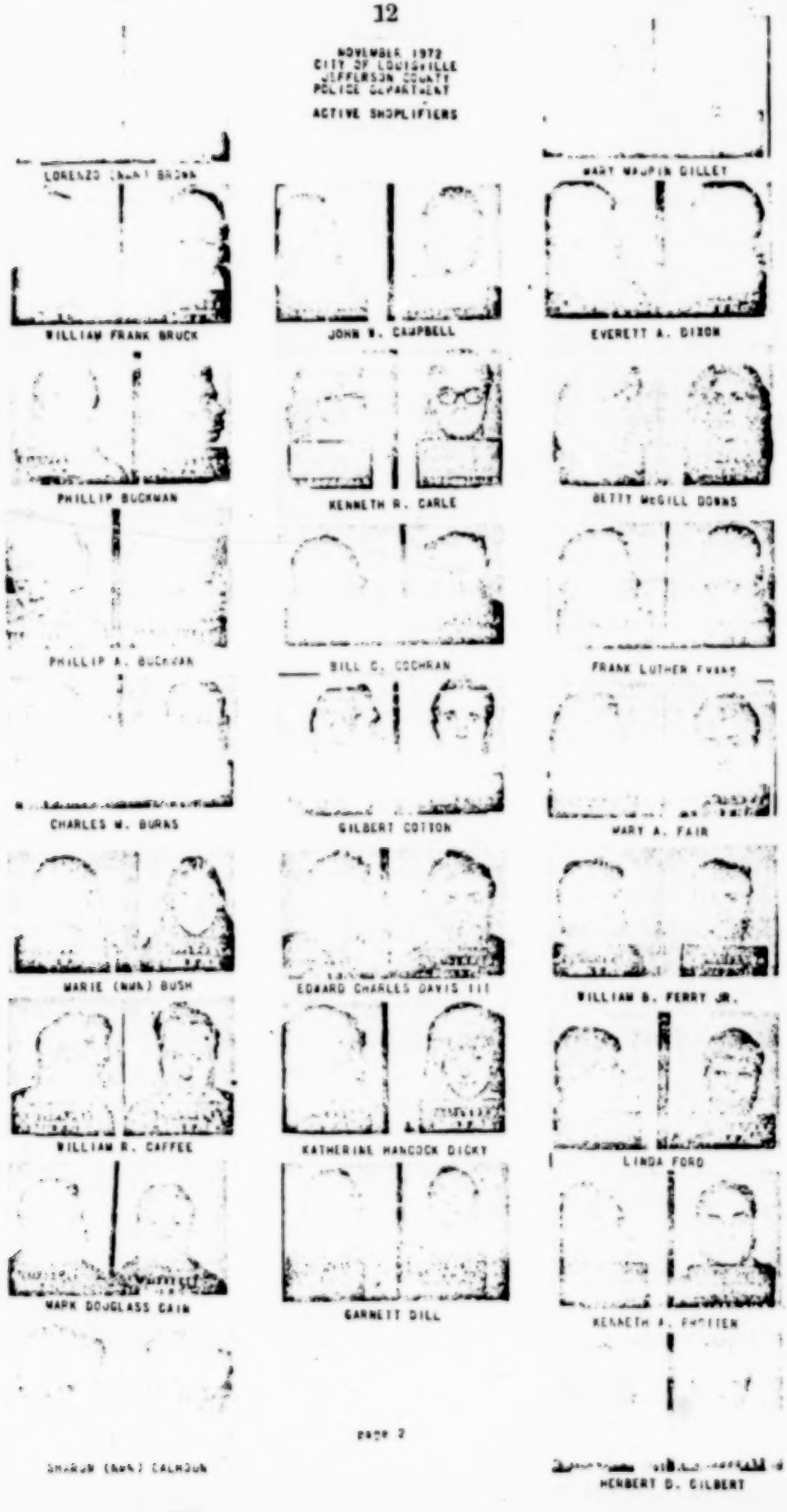


BEST COPY AVAILABLE

BEST COPY AVAILABLE

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENT

ACTIVE SHOPLIFTERS



NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENT

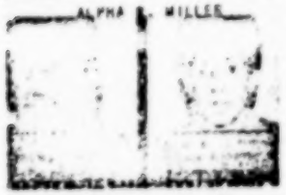
ACTIVE SHOPLIFTERS

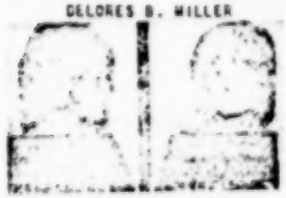
NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

SAMUEL McNEESE

ALPHA L. MILLER

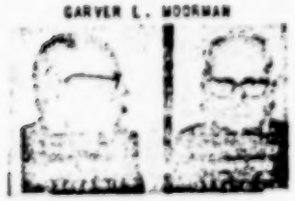

DELORES B. MILLER

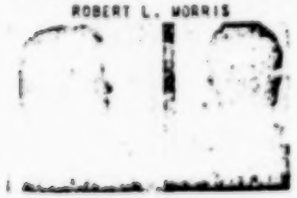

PAMELA LEE MILLER

ROBERTA MILLER

CAROL D. MIMMS

GARVER L. MOORMAN


ROBERT L. MORRIS


WARREN NASH

WALTER NELSON

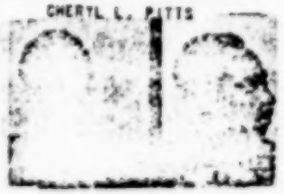
MORRIS LELAND NEW

CLARENCE O'DELL

HARRY T. PHELPS

PATSY ANN PHELPS

CHERYL L. PITTS


GEORGE D. POINTS

WILLIAM HENRY POWELL

KIMBERLY RAMOS

MARCIA E. RHODES

LOLIDA RISINGER

NOVEMBER 1972
CITY OF LOUISVILLE
JEFFERSON COUNTY
POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS

EDWARD L. ROBINSON

MARY F. ROGERS

CHARLES D. ROSENBARGER

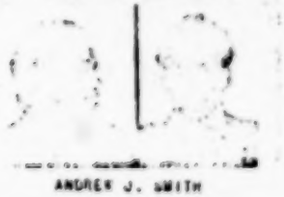
VITTORIO SAFFEI

NEYSA SCOTT

CLARENCE M. SEARS

ALTON D. SELF

THOMAS L. SINKHORN


ANDREW J. SMITH

DORIS SPENCER

KATHERINE SPENCER

IVORY STEVENSON

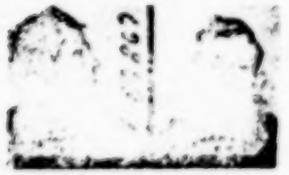
THOMAS C. TURNBILL

DAVID L. WADE

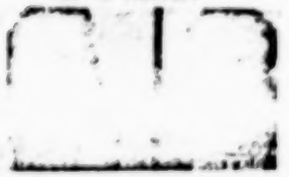
PATRICK WALSH

ARTHUR WELLS

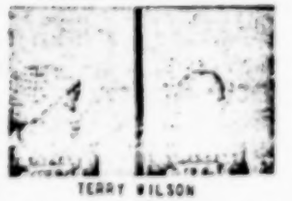
WILLIAM WELLS


WILLIAM PAUL WIEGAND

PAULETTE WIENTJES


ARTHUR WILLIAMS

LUCILLE ANN WILLIAMS


TERRY WILSON

GEORGE WRIGHT JR.

GELENA ZACHERY

1

TRANSCRIPT OF THE PROCEEDINGS

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil No. 7503

EDWARD CHARLES DAVIS, III - - - - - *Plaintiff*

v.

EDGAR PAUL, Chief of Police, Louisville Division of Police and
RUSSELL MCDANIEL, Chief of Police, Jefferson County Police - - - - - *Defendants*

Before Honorable Rhodes Bratcher, United States District Judge, Western District of Kentucky, at Louisville, Kentucky, on Monday, January 8, 1973, without a Jury.

Appearances:

For the Plaintiff
Robert A. Sedler, Esquire
William H. Allison, Esquire

For the Defendants
John R. Wilson, Esquire
Irvin Foley, Esquire
Frank A. Logan, Esquire

• • • • • • •

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Mr. Sedler: (Interrupting) We'd like to call as our first witness Colonel Edgar Paul.

By the Court: Come around.

EDGAR PAUL, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Robert A. Sedler

Mr. Sedler: You are Colonel Edgar Paul and you are the Chief of Police of the Louisville Division of Police, is that correct?

Mr. Paul: Yes, sir.

Q. And how long have you been Chief?

A. About a year and a half.

Q. And how long have you been on the force?

A. Thirty-one years.

Q. I'd like to mark as Plaintiff's Exhibit No. 1—

By the Court: (Interrupting) Let it be filed.

(Whereupon, a memorandum issued on behalf of the Louisville Division of

Police and Jefferson County Police was received and marked by the Reporter as Plaintiff's Exhibit No. 1.)

Q. I'd like to show you this document, Colonel Paul, on which your signature appears and ask you if in fact that is your signature?

A. It is my signature.

Q. And this document was sent out by you and Chief McDaniel in your capacity as Chief of Police of the City of Louisville, is that correct?

A. It was.

Q. Approximately when was it sent out?

A. Sometime just before the Christmas holidays. The exact date, I'm not sure of.

Q. To whom was it sent?

A. It was sent to the merchants. As far as the City Police were concerned, the merchants in the downtown area of Louisville.

Q. How many merchants would this have been?

A. I have no idea, sir.

Q. Well, do you have a list of the merchants you sent it to?

A. I don't have the list. It's

distributed by our Planning and Research Division, and I believe that there was probably about a thousand copies of this particular document made, and I think we now have about two hundred in the Louisville Division.

Q. So that about eight hundred then would have been circulated?

A. That's what I believe, yes, sir.

Q. Now, did you keep a record of the places to which they were circulated?

A. I'm not sure that we have an accurate record. We do have a running record of the persons that have asked for them in the past and that we have distributed them to. Now, whether we have an accurate record of exactly everyone this time, I'm not sure of.

Q. Would you explain what you mean by the satement "Persons who have asked for them in the past"?

A. These particular flyers have been distributed by the Louisville Division of Police for about fifteen years, and we have quite a few of the merchants who have asked for them. If we don't get them out when they think they should be out, then we

get a phone request or a letter or an oral request to know if we're going to distribute them again this year. That's what I mean by the ones that asked for them.

Q. Then you have a list of merchants who normally get them?

A. Yes, sir; I'm sure we do.

Q. Now, could a merchant come into the police office and identify himself as a merchant, obtain a copy of this?

A. Yes, sir; he could.

Q. Would you have a record of that when a person did?

A. I'm not sure whether I would have a record of it or not. I would have to check with the people who did distribute it, which are my Planning and Research Unit. I'm not sure about that.

Q. Was this distributed in Southern Indiana?

A. No, sir.

Q. Did you exchange this list with any police department in Southern Indiana?

A. Not to my knowledge.

Q. Now, in the—in response to the subpoena duces tecum, you produced the arrest record of

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Edward Davis and you were also asked to produce all records in your file relating to him, and you produced a record for a speeding offense that happened in 1967, is that correct?

A. Yes, sir.

Q. And this is the sum total of your records in regard to Edward Charles Davis?

A. Sum total of our arrest records, yes, sir.

Q. When you arrest a person, do you fingerprint them?

A. Yes, sir.

Q. And you photograph them?

A. Yes, sir.

Q. What do you do with the fingerprints and photographs?

A. They remain in our Identification Lab.

Q. Are they available for inspection by any other—any person outside the Police Department?

A. They're available for inspection by the persons whose record it is or by his written request for them or other law enforcement agencies.

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Q. But they would have to go through you?

A. Yes, sir.

Q. How about a person's arrest record such as the document that you've produced, is that available for inspection by anyone other than members of the Louisville Police Department?

A. Yes, it's available to the press. They have this through our teletype system.

Q. At the time of the arrest?

A. Yes, sir.

Q. Now, subsequent to the arrest, is that available to the press?

A. On request and approval by my office.

Q. Is it available to any other person on request and approval?

A. Yes. It's available to other law enforcement agencies, the Government agencies.

Q. But it wouldn't be available to private employers, for example?

A. No, sir.

Q. Do you furnish the Federal Bureau of Investigation with data relating to your arrest of subjects?

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A. Certain arrests, yes, sir.

Q. For certain offenses or—

A. (Interrupting) Certain offenses.

Q. These would generally be the more serious offenses?

A. Yes, sir.

Q. Now, on the arrest record of the shoplifting charge, there is a disposition—on all arrest records there is a place for disposition, is that correct?

A. Yes, sir.

Q. And on the card of Edward Davis for the offense of shoplifting, that space is filled in "FAWL, 9-22-71". What does that mean?

A. Filed Away With Leave to Reinstate on that date.

Q. Now, how would the police have obtained this information that it was filed away without (sic) leave? Is this routinely recorded?

A. It's routinely recorded. We keep a pending file. The card is placed in a separate file while it's in the court, and when it's disposed of in any manner, the court should normally return the card with the notation as to the disposition of the case.

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Q. So that you are aware of the disposition of all arrests that are made by the Louisville Police Department?

A. No, sir; only the ones that the court returns the decision to us. It is not mandatory that they do so.

Q. Do they in practice generally do so?

A. Normally, we get them back, yes, sir.

Q. Then who had the responsibility for preparing the flyer that was introduced here as Plaintiff's Exhibit No. 1?

A. The responsibility was, as I said, in my Planning and Research Unit. They were assisted by branches of the Louisville Division of Police and the Jefferson County Police Department.

Q. Who was the individual that was in charge of it?

A. Henry Rausch; Officer Henry Rausch.

Q. What is his position and rank?

A. He is Director of our Planning and Research Unit.

Q. And he would have had access to the arrest records?

A. Yes, sir.

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Q. And those arrest records would have indicated whether or not the person had been convicted of the offense?

A. Not necessarily.

Q. Or, to put it another way, it would indicate—if it—if there was a disposition on it, it would have indicated whether the person had been convicted or whether or not a disposition had taken place?

A. Yes, sir.

Q. So that when the flyer was prepared that person would have known that Edward Davis had not been convicted of the offense of shoplifting, is that correct?

A. Not necessarily.

Q. Wouldn't it be—it was on that card, wasn't it?

A. I have no way of knowing when that was entered on the card.

Q. The date is 9-22-71.

A. I believe, sir, that's the date that the decision was rendered, not the date that it was put on our card.

Q. Are you suggesting that this would

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have been put on subsequent to December, 1972?

A. I'm suggesting that it could have been put on at any time after the decision of the court.

Q. But it would have been—it was likely to have been put on before that time?

A. I have no way of knowing that, sir.

Q. Well, what's the normal practice for entering—how soon do you get back the disposition from the Police Court, Louisville Police? What's the normal time?

A. It varies, due to the business of the court, the ability of the secretary and the clerk in the court to get the case back to us with the proper designation. It varies from three days to two months.

Q. All right. But it's never taken more than two months?

A. I don't think so. I couldn't say. Not to my knowledge, anyway.

Q. So that it is likely that this designation which occurred on 9-22-71, based on past practice and experience, would have been entered prior to December, 1972, fifteen months later?

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A. I couldn't answer that question.

Q. Is it likely?

A. I couldn't answer that. I don't know if it's likely or not. It would be my opinion. I don't know.

Q. All right. I'll have your opinion.

By the Court: Well,—

Mr. Logan: (Interrupting) If Your Honor please—

By the Court: (Continuing)—I think it's in a realm—he's just risking an answer about this to satisfy the attorney. Go ahead.

Mr. Sedler: Well, Your Honor, I mean, I—I—I think the point—

By the Court: (Interrupting) I mean, he's just guessing at it. I mean, that's all. The pressure of your questions has caused him to venture a guess merely to relieve himself of further questions.

Mr. Sedler: Well, he's established that the ordinary practice is to enter this within two months after the event. Now, I'm sure the Chief knows as well as I know that this would have been entered before December, 1972, and just doesn't want—

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By the Court: (Interrupting) Well, he hasn't stated that. I don't know whether he knows it as well as you do or not.

Mr. Sedler: Because this is the normal pattern.

Mr. Logan: Judge, I would like—

By the Court: (Interrupting) That's what you're saying, Mr. Sedler. You're not testifying. I'm not going to ask this man or make him venture a risky answer on a matter he obviously doesn't know about merely to satisfy the urgings of the attorneys here.

Mr. Sedler: Well,—

By the Court: (Interrupting) If he doesn't know about it, I don't want him to get out on a limb about it.

Mr. Sedler: Very well.

By the Court: What—excuse me just a minute. What did you have to say?

Mr. Logan: Well, I was going to object to the general realm of these questions because the Chief of Police isn't necessarily the ones that makes these records, if Your Honor please.

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By the Court: Well, I think everybody understands that.

Mr. Sedler: We know that.

Mr. Logan: Well, that's exactly the point. You've reached the point because you're asking him something that the clerks up there do and the—and Doctor Sedler knows as much about the Louisville Police Court as I do, just from observation, never having been there. Unless the Chief of Police knows a lot more about it than a lot of lawyers, he doesn't know when those things are entered.

By the Court: Well, I think he's made that clear. I want him to testify, and I'm sure he's attempting to honestly and fairly, about what he knows. But I'm not going to make him risk answers—

Q. (Interrupting) All right. Who is in charge of preparing the arrest reports?

A. Officer Henry Rausch.

Q. And his position then, so that we—

A. (Interrupting) He's Director of our Planning and Research Unit.

Q. Then he would know if this entry

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occurred after December, 1972?

A. I'm afraid you would have to ask him. I don't know whether he would know that or not.

Q. He'd have the responsibility for knowing that?

A. He is the man who prepares the flyer to be distributed by getting the information from, as I mentioned

to you, the other units of our Police Department and the Jefferson County Police Department.

Q. Now, who made the decision to prepare the flyer for this year?

A. I made the decision, checked it with Colonel McDaniel, and he agreed to do it jointly.

Q. On each of the pages you used the designation, "Active Shoplifter", is that correct?

A. (Examining document) That's right.

Q. And you didn't limit this to persons who had been convicted of the offense of shoplifting, is that correct?

A. That's correct.

Q. My question is why did you not limit it to persons who had been convicted of the offense of shoplifting?

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A. I'm not sure why we didn't limit it, but what we were going on was, as states on the face page of the flyer, the persons were—had either been arrested during '71 or '72 or had been active in the field. So, therefore, we didn't limit it to convictions.

Q. Now, my question is what is the basis for your conclusion that a person—a person who has been arrested for the offense of shoplifting is an active shoplifter?

A. The very fact that he's been arrested for the charge of shoplifting and evidence presented to that effect.

Q. In other words, you're saying from the fact of arrest you would conclude and advise that he is an active shoplifter?

A. The fact of the arrest and the details of the arrest as you have on the card for Mr. Davis.

Q. Of course, this is based on what is presented by your officers?

A. That's right; the evidence presented.

Q. And this is not based on any finding of the court?

A. No, sir.

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Q. And I take it—on the flyer there is the opportunity, is it not, for the persons who receives this to contact the Police Department for more information about such persons, is that correct?

A. Yes, sir.

Q. And have you had requests for more information about the persons who are—

A. (Interrupting) Not personally.

Q. To the best—to the best of your knowledge, have such requests been submitted to the department?

A. I don't know that.

Q. Is there any other offense for which you distribute such flyers to merchants?

Mr. Logan: Object.

By the Court: What was the question?

Q. Or other—is there any other offense for which you distribute such flyers to merchants or—I was going to say other persons in the community.

By the Court: Well, I don't see—what's the relevancy of that?

Mr. Sedler: Well,—

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By the Court: (Interrupting) We're talking about this case. Let's see if we can't confine it.

Mr. Sedler: Well, I'm just trying to find out if he only does it for shoplifters.

By the Court: Well, just ask him for that. Do you do it for others?

Q. Any other offenses?

A. We do it for others.

Q. Pardon me?

A. We do it for others.

Q. For what other offense?

Mr. Logan: I object, unless we're going to get into—this is confined—

By the Court: (Interrupting) Well, I'm—I'm going to sustain the objection. You do it in other cases, other types of offenses?

The Witness: Yes, sir.

Q. And for these offenses you also include persons who have been arrested but whose arrest did not terminate in conviction?

A. We would; yes, sir.

Q. Now, on the—well, it may be called the shoplifting flyer, would this include all

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persons who were arrested for the offense of shoplifting during the year in question?

A. Yes, sir.

Q. And there wouldn't have been some persons who had been arrested whose names would be omitted? You went across the board on that?

A. Not intentionally.

Q. So you do try—without regard to any of the other facts, it was—it was the fact of the arrest that caused you to include the person's name and photograph in it?

A. No, sir; that's not right. Any information for a person that is active in the field would have been included in this flyer. If there was a photo in existence in the Louisville Division of Police—

Q. (Interrupting) Then this would include some persons—let me see—it would include some persons who had not even been arrested for the offense?

A. No, sir. We would have necessarily had to have a photo.

Q. Now, my question—then this includes persons who were arrested in previous years,

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is what I'm getting at.

A. Yes, sir; it could have.

Q. All right. So that if my understanding is correct, this included all persons who were arrested in '71 and '72?

A. That's true.

Q. And selected persons from—who were arrested in previous years?

A. I'm not sure that there is some people here that was arrested in previous years, but I assume from the number of persons here that many of these have been arrested many years back down the line consecutively, so their pictures would be there and the picture may have been taken a couple of years ago. If it had the same resemblance, we wouldn't necessarily have to take a new picture in '72.

Q. So there's no distinction made between persons whose arrest terminated in convictions and persons whose arrest did not terminate in convictions?

A. No, sir.

Q. That will be all on direct examination, Your Honor.

By the Court: Proceed.

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Cross-examination by Mr. John R. Wilson

Mr. Wilson: Colonel, when a person, an individual, is arrested and slated by your Police Department, is that noted in the records of the Louisville Police Court, the fact that a person has been arrested? In other words, you can go to the Louisville Police Court and check through their records and you can find out who's been arrested by the Louisville Police Department, can't you?

Mr. Paul: Yes, sir. When a person is arrested, we make a copy of the arrest information and forward it to the court immediately. The person would then appear before the court at a later time.

Q. And that record is available to any person that would go in and request it, wouldn't it? I mean, this is on record with the Police Court?

A. I couldn't answer about the Police Court. I assume it would be.

Q. Now, photographs that are taken of people arrested for any crime, these are referred to commonly as mug shots, is that correct?

A. That's right.

Q. If an individual comes in and

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complains that they've been a victim of a crime, isn't it normal practice for them to view various mug shots within the Police Department?

A. Yes, it is.

Q. Now, this flyer that was sent out to merchants, it contained some six pages, I believe. This was all stapled together, is that correct?

A. Yes, sir.

Q. And it would be read together as one document?

A. Yes, sir.

Q. That's all.

By the Court: You may stand down. Thank you.

(Witness excused.)

Mr. Allison: Call Mr. Al Allen.

By the Court: Come around.

ALBERT C. ALLEN, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

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Direct Examination by Mr. William H. Allison

Mr. Allison: State your name, please, Mr. Allen?

Mr. Allen: My name is Albert C. Allen.

Q. And where do you work?

A. At the Louisville Courier-Journal and Times.

Q. And what is your position with the—

A. (Interrupting) I'm Executive Director of Photography for the two newspapers.

Q. And do you know Mr. Eddy Davis?

A. Yes, I do.

Q. And in what capacity do you know him, Mr. Allen?

A. He is a member of my department.

Q. I see. And in what—what kind of position does he have with your department?

A. He is a lab man and a trainee photographer.

Q. Is it fair to say that you're his boss?

A. Yes, it is.

Q. All right. Now, Mr. Allen, I'm

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handing you Defense (sic) Exhibit No. 1 and asking you if you have ever seen that flyer before?

A. Yes, I have.

Q. Do you remember when you saw it?

A. Approximately mid December of 1972.

Q. And—okay, sir. And as a result of seeing that flyer did you take any action or did you have any discussion with any of your employees?

A. The flyer was originally called to my attention by two of my employees. I obviously discussed it with them at that time.

Subsequently, I examined the flyer myself in the office of a Louisville merchant and later discussed the incident with Mr. Davis.

Q. And in your discussion with Mr. Davis as a result of seeing the flyer did—what was the basis of your discussion with Mr. Davis?

A. I wanted first to inform him of the flyer's existence which seemed only fair and to inform him that I knew of its existence and that the flyer's existence was a matter of discussion within the department.

I wanted also to hear his—his version of the events that caused—his inclusion in the flyer.

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Q. And as a result of your discussion with Mr. Davis did you as his boss take any action in regard to Mr. Davis?

A. I'm not quite sure what you mean by "action".

Q. What—what—what was the result of the discussion that you had with Mr. Davis in regard to the flyer?

A. None. I informed him, as I say, that we—we knew about it, that I had no intention of judging his guilt or innocence on the basis of—of such a flyer, but this was a matter between himself and the courts and that as far as that incident itself was concerned the matter was closed, however, that he had best not find himself in a similar situation.

Q. And—

By the Court: (Interrupting) What did—I don't—now, you—you warned him that—not to find himself in the future in a similar situation. Do you mean—I don't know exactly what you mean by that.

The Witness: Well, I—

By the Court: (Interrupting) Do you mean not to have his—his picture—

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The Witness: (Interrupting) No, no. I see. Not to be arrested for shoplifting in the future.

By the Court: Arrested?

The Witness: Yes, sir.

By the Court: I thought you just stated a minute ago that you had no intention at any time to prejudge his guilt or innocence but that—and the appearance merely of his picture would have no effect on you.

The Witness: I said that the—the appearance of his picture and the listing of this case had no effect immediately; that is, he was not going to be fired at this time.

By the Court: Yeah.

The Witness: But that I would view very seriously any further incidents of this nature.

By the Court: Proceed.

Q. Is it or not a fact, Mr. Allen, that the effect of the flyer might be a detriment to Mr. Davis' work in relationship to the Courier-Journal?

Mr. Logan: I object.

By the Court: Sustained. Don't answer that.

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Q. Mr. Allen, as a result of the flyer, to your knowledge of its circulation, did you as Mr. Davis' boss, head of the department, have a different attitude as to the possible work situations that you could put Mr. Davis in?

Mr. Logan: I'm going to object to that, if Your Honor please.

By the Court: Yeah. Let's—sustained. Let's be more definite. Did you have a different attitude? I don't know maybe he had a more favorable attitude. Just say that. Maybe he would answer yes.

Q. Did you feel that this would interfere with Mr. Davis' function as a photographer?

By the Court: Don't lead him; just ask him the question.

Mr. Logan: Objection as to how he would feel.

By the Court: Just ask him questions. You're telegraphing every answer to him in the question.

Mr. Allison: Yes, Your Honor.

By the Court: Just ask him questions. Don't say, "Do you feel," and then tell him

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how he felt.

Q. Did you believe on—that you would have to limit Mr. Davis' activities?

Mr. Wilson: Objection.

Mr. Logan: Objection.

By the Court: Sustained.

Q. Could the circulation of this flyer have an effect on

Mr. Davis' ability to work effectively as a photographer with your department?

Mr. Logan: I object to that.

By the Court: Could it?

Mr. Allison: Yes, Your Honor.

By the Court: Overruled. I mean; sustained.

Q. No further questions, Your Honor.

By the Court: Wait just a minute. Wait just a minute. I don't—is that all—there seems to be some doubt whether he was through or not.

Mr. Allison: If Your Honor please, I would at least like to make an offer of proof for the record as to what the witness would say if I was able to have him under cross.

By the Court: All right.

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Mr. Allison: He is under subpoena, Your Honor. So may I do that, Your Honor?

By the Court: Do you want to do it narratively?

Mr. Allison: Before the bench or it doesn't make any difference.

By the Court: You can just go ahead.

Mr. Allison: All right. In answer to my question what would your answer be to the questions that I attempted to ask.

By the Court: Well, I believe you better be more specific.

The Witness: You asked me several questions, sir.

By the Court: Yeah.

Q. Do you feel that as a result of the flyer that Mr. Davis' ability as a photographer with the department would be hindered in any way?

A. I felt there was a—a potential that it would be hindered.

Q. As a result of the flyer, did you feel that you might have to possibly limit the places that he would possibly in the future go in as a member

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of your department?

A. Very definitely, I would.

Q. And why did you feel that way?

A. Our photographers must be accepted as a reasonably honorable and truthful man wherever they go. I felt that in view of this flyer's circulation to merchants of the community I could not, for example, assign Mr. Davis to photographing anything in a merchantile establishment and so that should such an assignment come up I would have been forced to have someone else cover that assignment rather than Mr. Davis.

Q. That's all.

By the Court: Did you restrict him?

The Witness: No, I did not.

By the Court: You have not restricted him at all?

The witness: I have not restricted him, no, sir.

By the Court: Okay. Let's go. Proceed. Are you through now, gentlemen?

Mr. Allison: Yes, Your Honor.

By the Court: All right.

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Proceed.

Mr. Logan: We don't care to question him.

By the Court: All right. Stand down. Thank you.

(Witness excused.)

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